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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC, ET AL.,

Petitioners,

v.

DONALD C. FLOWERS, AND
KING E. JONES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHILIP DEL COSTELLO,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief Amicus Curiae Of The Chamber Of Commerce Of The United States Of America

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OCTOBER TERM, 1982

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UNITED STEELWORKERS OF AMERICA
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DONALD C. FLOWERS, AND
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PHILIP DEL COSTELLO,

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INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, ET AL.,

Respondents.

BRIEF AMICUS CURIAE SUBMITTED BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is the largest business federation in the United States, with a

membership in excess of 235,000 corporations, proprietorships and individuals throughout the United States. More than 3,700 state and local Chambers of Commerce and trade associations are members.

The issues presented by *United Steelworkers of America, et al. v. Flowers, et al.* (No. 81-2408), and by *Del Costello v. International Brotherhood of Teamsters, et al.* (No. 81-2386), which has been consolidated herewith,[1] are of vital concern to the large number of Chamber members who are parties to collective bargaining agreements containing grievance and arbitration procedures for the resolution of labor disputes and who rely upon the smooth functioning of the private dispute-resolution machinery to preserve industrial stability and maintain productivity. The efficacy of a private dispute-resolution system obviously suffers if arbitration awards, on which parties rely to guide their conduct under the collective bargaining agreement, may be challenged long after they are rendered.

The *Flowers* decision permits employees to challenge their union's representation in an arbitration proceeding three years after the award is rendered: a challenge which, if successful, may remove the "bar" of finality and undercut the precedential value of arbitration awards. We urge this Court to reverse *Flowers* and to select a limitations period which will apply to employee § 301 claims against the employer and union alike and will adequately recognize the critical importance of a rapid resolution of labor disputes.

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[1] In addition to the issues concerning the appropriate statute of limitations in "hybrid" breach of contract-duty of fair representation proceedings under § 301, *Del Costello* also presents the question whether *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), should be applied retroactively — a question which the Chamber's amicus brief does not treat. The Chamber's brief discusses the issues raised in *Del Costello* only to the extent that they coincide with the issues presented in *Flowers*.

QUESTIONS PRESENTED

I. Does the state statute of limitations for vacating arbitration awards apply to a claim against the union in hybrid breach of contract-duty of fair representation proceedings under § 301?

II. If not, may the courts borrow either the three-month limitations period of the Federal Arbitration Act (9 U.S.C. § 12) or the six-month limitations period of the Labor Management Relations Act (29 U.S.C. § 160(b))?

SUMMARY OF ARGUMENT

Selection of an appropriate statute of limitations to govern the timeliness of employee claims against the employer and union in hybrid § 301 proceedings should be guided by the paramount objective of federal labor policy to ensure the prompt disposition of labor disputes. Options available to the Court in a hybrid breach of contract-duty of fair representation proceeding include (in descending order of desirability): (1) extending *Mitchell* and applying the state's statute of limitations governing the vacation of arbitration awards to the claim against the union;[2] (2) applying the three-month limitations period of the FAA uniformly to employee claims against the employer and union; (3) limiting *Mitchell* to the claim against the employer and applying to the union (a) § 10(b) of the LMRA or (b) a state tort or nonmedical malpractice statute of limitations; or (4) applying the six-month statute of limitations contained in § 10(b) uniformly to claims against the employer and the union.

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[2] In the few states which do not have specific limitations periods for vacating arbitration awards, we suggest that courts refer to an analogous nonarbitration state statute *if* compatible with the federal goal of rapidly resolving labor disputes. In the absence of an appropriate state statute, courts should borrow the three-month limitations provision of the Federal Arbitration Act (FAA), 9 U.S.C. § 12.

None of the foregoing alternatives offers a conceptually pristine model for selecting the appropriate statute of limitations. However, we suggest that extending *Mitchell* to claims against the union not only recognizes the inextricable link between the two elements of an employee's hybrid § 301 claim—the duty of fair representation and breach of contract—but also is consistent with *Mitchell*'s broad language. In addition, extending *Mitchell* strikes the appropriate balance between federal labor policy, with its emphasis on the rapidity of resolving disputes, and the principle of *Hoosier Cardinal*,[3] which *Mitchell* reaffirmed, that "state statutes have repeatedly supplied the periods of limitations for federal causes of action when federal legislation has been silent on the question." 383 U.S. at 704.

Moreover, since the majority of states have enacted statutes allowing aggrieved parties 90 days within which to seek to vacate an arbitration award,[4] the practical consequence of extending *Mitchell* to claims against the union will be to promote a significant measure of desirable uniformity. In addition, if the Court borrows the three-month limitations period of the FAA to govern the timely filing of claims in the states which do not have specific limitations periods for vacating arbitration awards, uniformity will be enhanced.

Of course, uniformity may be accomplished far more

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[3] *International Union, United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).

[4] Twenty-three states (including the District of Columbia) have adopted in large measure the Uniform Arbitration Act, which provides for a 90-day period in which to apply to vacate an arbitration award. At least five other states, while not adopting the Uniform Act, provide for 90-day limitations periods, and at least six states have statutes creating limitations periods shorter than 90 days. VIII Martindale-Hubbell Law Directory, Law Digests, Uniform Acts and A.B.A. Codes (1982 ed.); *see also Mitchell, supra*, 451 U.S. at 63 n.5.

directly by adopting the FAA's three-month limitations period for both claims—or, alternatively, but less appropriately, the six-month limitations period of § 10(b) of the LMRA. Judicial creation of a uniform limitations period is not without its drawbacks since Congress has considered the issue and declined to enact a uniform provision. *Hoosier, supra,* 383 U.S. at 703. In addition, neither the FAA nor the LMRA, which are the only potential candidates for adoption, provides an entirely adequate model. However, if this Court elects to borrow an analogous federal statute of limitations, we urge the selection of the FAA, which is more tailored to § 301 actions than the LMRA.

ARGUMENT

I. STATE STATUTES OF LIMITATIONS GOVERNING VACATION OF ARBITRATION AWARDS APPROPRIATELY APPLY TO EMPLOYEE CLAIMS AGAINST THE UNION IN HYBRID § 301 PROCEEDINGS

A. *Mitchell* Requires Application Of The State Statute Governing The Vacation Of Arbitration Awards To The Employee's § 301 Claim Against His Employer

The starting point of analysis, perhaps, is *United Parcel Service, Inc. v. Mitchell,* in which the Supreme Court, reversing the Second Circuit, concluded that a hybrid § 301 claim against the employer was more accurately characterized as an action to vacate an arbitration award, rather than a breach of contract action; and, accordingly, selected New York's 90-day statute of limitations governing the vacation of arbitration awards in lieu of the six-year contract statute of limitations for which the Second Circuit opted. In reversing the Second Circuit, the Supreme Court initially observed that since Congress did not enact a stat-

ute of limitations to govern § 301 proceedings, the timeliness of Mitchell's complaint was determined by reference to the appropriate state statute of limitations. 451 U.S. at 60, relying on *Hoosier, supra,* 383 U.S. at 704-705. In selecting an appropriate state statute, the Court examined the "nature" of the federal claim and the federal policies at stake.

As to the former, the Court concluded that Mitchell's claim, even though based on a contract, was more aptly characterized as an action to vacate an arbitration award since the aggrieved employee is not entitled to relief unless he overturns the arbitration award. Mitchell raised in the § 301 proceedings the very claim his union presented to the arbitration panel and requested the identical relief from the court that the union requested from the panel. In short, Mitchell was " 'dissatisfied with and simply seeks to upset the arbitrator's decision that the Company did not wrongfully discharge him.' " 451 U.S. at 61, quoting *Liotta v. National Forge Co.*, 629 F.2d 903, 905-906 (3d Cir. 1980), *cert. denied,* 451 U.S. 970 (1981).[5]

Moreover, Mitchell's claim against his employer could not accurately be characterized as a mere breach of contract since Mitchell was initially required to demonstrate that the union breached its duty of fair representation before the court could even reach the merits of his contract claim. Stated differently, the "indispensable predicate" (451 U.S. at 62) of Mitchell's § 301 suit was not the breach of contract, but a breach of representation, which is "more a creature of 'labor law' . . . than it is of general contract law." 451 U.S. at 63.

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[5] The Court rejected alternative characterizations of Mitchell's claims (*e.g.*, personal injury or malpractice) which similarly disregarded the essential point that an arbitration award "stands between" the employee and relief which may be awarded against his employer. 451 U.S. at 62 n.4.

Federal labor policy, which favors the "relatively rapid disposition of labor disputes," [6] supported the Court's selection of the shorter statute of limitations governing the vacation of arbitration awards. The Court expressly underscored the undesirability of allowing "the results of the grievance and arbitral process . . . [to be] suspended in limbo for long periods." 451 U.S. at 64. Recognizing that none of the available statutes of limitations "fit hand in glove," the Court suggested that selection of an appropriate state statute [7] be guided by federal labor policies.

B. *Mitchell's* Rationale, And Federal Labor Policies, Require Adoption Of The State Arbitration Statute To The Employee's Incidental Claim Against The Union

1. The inextricable link between the employee's representation claim against the union and his contract claim against the employer supports application of the identical statute of limitations

The *Mitchell* Court left open the question of which statute of limitations may appropriately be applied to an employee's unfair representation claim against the *union* in a hybrid § 301 proceeding.[8] However, a close reading of

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[6] *Hoosier, supra,* 383 U.S. at 707.

[7] In the Court's view, prior decisional law restricted its choice to state statutes. 451 U.S. at 64.

[8] *Mitchell* leaves open two additional questions which neither *Flowers* nor *Del Costello* directly raises: (1) whether state statutes of limitations governing the vacation of arbitration awards apply in a proceeding in which an arbitration award has *not* been rendered and (2) whether *Mitchell* applies to an employee claim against the union alone — *i.e.*, in a proceeding in which the employer has not been joined as a party defendant. As to (1), *Mitchell's* essential

[Continued on page 8]

Mitchell supports adoption of the identical statute of limitations for a claim against the union.[9]

Initially, we underscore that nothing in *Mitchell* expressly *forecloses* application to the union of the state statute of limitations governing the vacation of arbitration awards. On the contrary, the rationale of *Mitchell* strongly militates in favor of applying the identical state statute of limitations to the two elements of the employee's hy-

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[Continued from page 7]

rationale — that the "indispensable predicate" of a § 301 claim is a "demonstration that the Union breached its duty of fair representation" (451 U.S. at 62) — applies equally in a context in which the union's breach prevents settlement of a grievance or its submission to arbitration and the rendering of an award. Regardless of the stage of the grievance-arbitration procedure at which the union breaches its duty, the employee is entitled to reach the merits of his contract claim only if he initially demonstrates breach of duty by the union. *See Hall v. Printing Union Local 3*, 112 LRRM 2151, 2154 (7th Cir. 1982) ("to apply a longer limitations rule to claims challenging arbitrated settlements than to non-arbitrated settlements would be to provide employers with a strong incentive to arbitrate every labor grievance regardless of merit"); *compare Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 572 (1976) ("[t]o us, it makes little difference whether the union subverts the arbitration process by refusing to proceed as in *Vaca* or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee"), quoting *Margetta v. Pam Pam Corp.*, 501 F.2d 179, 180 (9th Cir. 1974).

As to (2), the timeliness of a claim which an employee files against the union alone should be similarly governed by the state arbitration statute inasmuch as the employee's claim is linked to the employer regardless whether the employee sues the union alone or joins the employer.

[9] Justice Stevens, while emphasizing that the only question properly before the Court was whether the Second Circuit selected the most appropriate New York statute of limitations to govern the employee's claim against his employer, feared that the Court's decision could be interpreted to require application of the identical statute of limitations to the employee's claim against the union for breach of the duty of fair representation. Justice Stevens' acknowledgment that this interpretation would be "understandable" in light of *Mitchell's* "broad language" certainly supports the Chamber's reading of *Mitchell*. 451 U.S. at 72. (Stevens, J., concurring in part and dissenting in part).

brid claim. *Fedor v. Hygrade Food Products Corp.*, 533 F. Supp. 269, 272 (E.D. Pa. 1982) (*Mitchell* "requires" courts to apply the identical statute of limitations to employee claims against the employer and union), *aff'd*, 687 F.2d 8, 9 (3d Cir. 1982). The Court repeatedly emphasized the inextricable link between the employee's § 301 breach of contract claim against his employer and his breach of duty claim against the union:

> To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. [451 U.S. at 62, quoting *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976).]

See also Vaca v. Sipes, 386 U.S. 171, 183 (1967) (underscoring the "intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts," and observing that the question whether the union breached its duty of fair representation will typically be a "critical" issue in the employee's underlying breach of contract claim against his employer).[10]

Similarly, the Court pointed out that the employee's representation claim against his union is "more a creature of 'labor law' . . . than it is of general contract law." 451 U.S. at 63. The Court's reference to the "ancestry" of the claim against the union underscores that the two claims,

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[10] *Cf. Czosek v. O'Mara*, 397 U.S. 25, 28 (1970) (while rejecting unions' contention that the employer was an indispensable party in an analogous proceeding under the Railway Labor Act, the Court at least tacitly acknowledged that the injury to employees flowing from the union's alleged refusal to process their grievances has its "roots" in their discharge by the employer); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 224 (1958) (applying identical statute of limitations to two closely interrelated claims — a maritime claim of unseaworthiness, for which federal law did not provide a statute of limitations, and a negligence claim under the Jones Act, which contained a three-year statute of limitations — even though the claims were varied in "elements of proof, type of defenses and extent of recovery").

which are perhaps equally "creatures" of labor law,[11] should be subject to identical statutes of limitations. Indeed, the juxtaposition of references to the employee's claim against the *union* and to the *employer's* perhaps "ultimate" responsibility to respond in damages (451 U.S. at 63) aptly illustrates the nexus between the two claims. If the link is indeed inextricable,[12] the justification for applying different statutes of limitations to the two interrelated claims evaporates.

2. The critical federal interest in rapidly resolving labor disputes, coupled with very practical considerations of judicial economy, dictates extension of *Mitchell* to § 301 claims against the union

The federal labor policies underlying the *Mitchell* Court's selection of New York's arbitration statute apply with perhaps equal force to employee claims against the union. Thus, the federal goal of rapidity is scarcely advanced if a labor dispute is permitted to fester for the considerably longer period of time contemplated by the *Flowers* court below. The disputants, including the employer, union and the aggrieved individual employee(s)—and, indeed, em-

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[11] Mitchell's claim of wrongful discharge derived from "just cause" notions, which are of fundamental importance in labor arbitration law. A significant body of arbitral law has evolved which defines the nature and scope of the just cause protections afforded employees. Moreover, the grievance and arbitration procedures which provide the mechanism for vindicating employee rights are a long-established feature of the collective bargaining system and are critical to its survival.

[12] Justice Stewart, while arguing in favor of applying § 10(b) of the LMRA, stated that "the two elements of respondent's hybrid action cannot be disentangled: the duty of fair representation is 'part and parcel of [the] § 301 [claim].'" 451 U.S. at 69 (Stewart, J., concurring in the judgment), quoting *Vaca v. Sipes*, 386 U.S. at 186. Even Justice Stevens, who argues that the two claims are "conceptually distinct," concedes their "close relationship." 451 U.S. at 73 n.2.

ployees covered by the collective bargaining agreement who are not participants in the dispute, but may be affected by its outcome—have an interest in the expeditious resolution of the *entire* controversy. The spectre of piecemeal litigation destabilizes collective bargaining relationships, which can scarcely inure to the advantage of individual employees whom the Second Circuit presumptively intended to benefit by applying to the employee's representation claim against the union the lengthy state malpractice statute of limitations.[13] Indeed, the precedential value of arbitration awards or grievance settlements will be seriously eroded if their status remains "in limbo" for the very long period contemplated by the *Flowers* rule.

Practical considerations of judicial economy support a rule that requires application of an identical, reasonably short statute of limitations, which may encourage employees to combine in a single proceeding their § 301 claims against the employer and union, consistent with federal labor policy. *See generally, Hines,* 424 U.S. at 567 (suggesting desirability of joining employer and union in a single proceeding); *Vaca v. Sipes,* 386 U.S. at 197 ("the employer may be (and probably should be) joined as a defendant in the fair representation suit"). Joinder of the employer and union in a single proceeding permits, in turn, a more intelligent fashioning of remedies in accordance with *Vaca v. Sipes.* Under *Vaca's* hierarchy of remedies, courts must initially consider the appropriate-

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[13] A lengthy limitations period seems particularly inappropriate in view of the typically very short statutes of limitations to which the parties are accustomed in the administration of collective bargaining agreements. Thus, if, in the interest of "rapidity," the parties allow themselves only three or four weeks to exhaust the several steps of a grievance procedure, why should the courts "encourage" a prolonged delay (perhaps three or more years) before the outcome of the dispute can be definitively ascertained? *Cf. Local 1020 of the United Brotherhood of Carpenters v. FMC Corp.,* 658 F.2d 1285, 1290 (9th Cir. 1981).

ness of an order compelling the employer and union to arbitrate the underlying grievance.[14] If a longer statute of limitations applies to the union, and the employee fails to initiate proceedings within the shorter limitations period applicable to the employer, a court could not very well order arbitration of the underlying grievance to remedy the union's breach of duty since the employer is obviously an indispensable party to the arbitration proceedings.[15]

If arbitration is not available, *Vaca* requires an apportionment of damages between the employer and union according to fault. If the employer and union are joined in a single proceeding, damages may be more intelligently apportioned in cases in which the union's breach of duty contributed to the employee's injury.[16] "What possible

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[14] While declining to restrict the employee's remedy to a decree compelling arbitration, the Court acknowledged that arbitration is "an" available remedy and, at least inferentially, the preferred remedy. 386 U.S. at 196. The Court explained that arbitration is not "inflexibly" required since the employee's injury may be partly attributable to the union's conduct, which an arbitrator may be powerless to remedy, or the arbitrable issues may be "substantially resolved in the course of trying the fair representation controversy." The Court pointed out that *under the foregoing circumstances*, courts should be "free to decide the contractual claim and to award the employee appropriate damages or equitable relief." 386 U.S. at 196. Indeed, Justice Fortas, concurring in the result, observed that the majority's remedial scheme provides for appropriate damages or equitable relief "apparently when arbitration is not available." 386 U.S. at 201.

[15] If, however, the *court* decides the contractual claim in the employer's absence, the union, although placed in a perhaps awkward position, could nonetheless defend the breach of contract claim on which the employee is required to prevail in order to recover from the union. At an arbitration hearing, of course, the union is *prosecuting* the grievance and can scarcely serve as the employer's surrogate.

[16] Damages attributable to the employer's breach of contract may not be charged to the union, but the union is responsible for increases in damages caused by its breach of duty. 386 U.S. at 197-198. *Bowen v. United States Postal Service*, 51 U.S.L.W. 4051 (Jan.

[Continued on page 13]

sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer?" *Vaca*, 386 U.S. at 187. While the Supreme Court was referring to the difficulties associated with two independent tribunals (the Board and the courts) "repair[ing] a single injury," its observation aptly illustrates the difficulty of fashioning an appropriate remedy if the running of a shorter statute of limitations forecloses recovery against the employer.

[Continued from page 12]

11, 1983) (No. 81-525). The *Bowen* Court, reaffirming *Vaca's* "governing principle," apportioned damages for an employee's wrongful discharge "where the default of . . . [the employer and union] contributes to the employee's injury" (Slip op. at 14) in accordance with the following formula: back pay accruing prior to a hypothetical date upon which an arbitration award would have been rendered had the union pursued the grievance to arbitration is attributable solely to the employer; damages accruing thereafter are attributable to the union. The Court suggested, however, that the manner of apportionment could vary with the "degrees of fault" (Slip op. at 17-18 n.19) of the employer and union and, in addition, a portion of the back pay liability otherwise attributable to the union could be shifted to the employer if the union "bring[s] its default to the employer's attention." (Slip op. at 14 n.15.) Application of *Bowen's* formula for apportioning damages may require the exercise of discretion by the trier of fact which joinder of the employer and union in a single proceeding will facilitate.

While obviously increasing the financial value of the employee's representation claim against the union, *Bowen*, we submit, does not undermine the long-established view that the gravamen of the employee's hybrid § 301 claim is the employer's breach of contract. Indeed, the employee recovers *nothing* from the union unless he establishes a breach of contract. *See Hines, supra*, 424 U.S. at 570-571.

Nor does *Bowen* undercut either the essential rationale of *Mitchell* —that an employee's hybrid § 301 claim, although based on a breach of contract, is more accurately characterized as an action to vacate an arbitration award—or the justification for its extension to claims against the union: *i.e.*, the inextricable link between the contract and representation claims (*supra*, in text at 9). Indeed, the *Bowen* Court does not even cite *Mitchell* or allude to the *Vaca/Hines/Mitchell* characterization of the relationship between the two claims.

C. The *Flowers* Court Erred In Applying A Different Statute Of Limitations To The Claims Against The Employer And Union

Notwithstanding the foregoing, the court below in *Flowers* would apply a different statute of limitations to the claims against the employer and union primarily because they are "conceptually distinct." [17] Admittedly, the claims are "distinct" in the sense that the nature of the evidence required to establish a breach of contract and a violation of the duty of fair representation varies significantly; the defenses vary; and the remedies may vary. Nonetheless, the employee suffers a "single," underlying injury (*Vaca*, 386 U.S. at 187) flowing from the employer's conduct

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[17] While the post-*Mitchell* Courts of Appeals have reached inconsistent decisions on the applicability of *Mitchell* to claims against the union (*infra* at n. 19, 20), the majority of pre-*Mitchell* Courts of Appeals, perhaps anticipating *Mitchell*, applied the identical statute of limitations to claims against the employer and union alike. *Liotta v. National Forge Co., supra*, 629 F.2d at 903 (characterizing combined claims against employer and union as action to vacate arbitration award); *Gallagher v. Chrysler Corp.*, 613 F.2d 167, 169 (6th Cir.) (the identical statute of limitations "ordinarily" applies to claims against employer and union), *cert. denied*, 449 U.S. 841 (1980); *Warren v. International Brotherhood of Teamsters*, 544 F.2d 334, 337 (8th Cir. 1976); *Butler v. Local 823, International Brotherhood of Teamsters*, 514 F.2d 442, 448 (8th Cir.) (applying Missouri's five-year written contract statute of limitations to claims against employer and union), *cert. denied*, 423 U.S. 924 (1974); *Kennedy v. Wheeling-Pittsburgh Steel Corp.*, 81 LRRM 2349 (4th Cir. 1972); *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1252 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971). *But see De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970) (applying Puerto Rico's one-year tort statute of limitations to bar employee claim against union in hybrid § 301 proceeding); *Sanderson v. Ford Motor Co.*, 483 F.2d 102 (5th Cir. 1973) (following *De Arroyo*). Recently, the First Circuit, while not expressly deciding the issue, "intimated" that, in light of *Mitchell*, Massachusetts' 30-day statute for the vacation of arbitration awards applies also to the employee's § 301 claim against the union. *McNutt v. Airco Indus. Gases Div.*, 687 F.2d 539, 542 (1st Cir. 1982); *accord Sear v. Cadillac Automobile Company of Boston*, 654 F.2d 4, 6-7 (1st Cir. 1981).

and while the union's breach of its duty may have increased, or contributed to the injury, its essential character remains unaltered.[18]

The *Flowers* court draws on language from *Mitchell* which purportedly supports application of a different statute of limitations to the claim against the union. Specifically, the Second Circuit cites the *Mitchell* Court's observation that the unfair representation claim is " 'more a creature of 'labor law' . . . than . . . of general contract law,' " coupled with its references to *Hoosier* and § 10(b). 671 F.2d at 89-90. *Hoosier*, of course, *rejected* the notion that the judiciary should create a federal limitations period, rather than resort to the most analogous state statute of limitations. In any event, the references to *Hoosier* and section 10(b) were intended not to suggest the appropriateness of applying § 10(b) to the claim against the union, but to underscore a leading federal policy favoring rapid disposition of labor disputes—a policy which, the Court noted, supported the selection of the shorter statute of limitations in *Hoosier* and *Mitchell*.

The *Flowers* court, while applying different statutes of limitations, acknowledged that the *Mitchell* dicta may well have supported a contrary ruling. 671 F.2d at 89. Indeed, in a pre-*Mitchell* decision, the Second Circuit *did* reach the

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[18] The *Flowers* court maintains that the employee's unfair representation claim is "closely analogous" to an action for attorney malpractice. 671 F.2d at 91. The different relief to which plaintiff is entitled in attorney malpractice and breach of duty actions significantly undercuts the analogy. An attorney guilty of malpractice may be responsible for the damages plaintiff would have recovered had he prevailed on his claim against the defendant. *Williams v. Bashman* 457 F. Supp. 322, 329, (E.D. Pa. 1978); *Sitton v. Clements*, 257 F. Supp. 63, 67 (E.D. Tenn. 1966), *aff'd per curiam*, 385 F.2d 869 (6th Cir. 1967). *Vaca* and *Bowen*, however, foreclose a similar standard of recovery against the union in a hybrid § 301 proceeding n. 16, *supra*).

contrary conclusion, applying the identical statute of limitations principally on the ground that the employee, in order to prevail on his claim against the employer, was first required to establish a breach by the union of its duty of fair representation—precisely the rationale relied on by post-*Mitchell* courts in extending *Mitchell* to claims against the union.[19] *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1252 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971). Inexplicably, the *Flowers* court does not refer to *Abrams*.[20]

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[19] *Service Employees International Union, Local No. 36 v. Office Center Services, Inc.*, 670 F.2d 404, 408 n. 7 (3d Cir. 1982) (statute governing the vacation of arbitration awards applies to claim against union); *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1353 (9th Cir. 1981) (accord).

[20] Courts of Appeals, in addition to the *Flowers* court, which have addressed the question and applied a different statute of limitations to the claim against the union either have eschewed independent analysis of the issues, *see Hand v. International Chemical Workers Union*, 681 F.2d 1308, 1313 (11th Cir. 1982) (following *Flowers* and applying state tort statute of limitations to claim against the union) or declined to apply the relevant state arbitration statute because of language therein excluding collective bargaining agreements from coverage. *Edwards v. Sea-Land Service, Inc.*, 678 F.2d 1276, 1284 (5th Cir. 1982), *petition for cert. filed* 51 U.S.L.W. 3511 (Dec. 21, 1982) (No. 82-1054); *Badon v. General Motors Corp.*, 679 F.2d 93, 99 (6th Cir. 1982) (applying § 10(b) to claim against the union in the absence of a Michigan statute applicable to vacation of labor arbitration awards). *But see Stevens v. Gateway Transportation Co.*, 112 LRRM 2177, 2179 (7th Cir. 1982) (applying Illinois' 90-day statute of limitations for vacating arbitration awards notwithstanding exclusion of awards entered pursuant to a collective bargaining agreement; "[w]e are not . . . bound by the letter of state limitation statutes to disserve the spirit of national labor policy"). A week before *Edwards* was decided, a different panel of the Fifth Circuit, observing that *Mitchell* had resolved the dispute among the Courts of Appeals concerning the appropriate state statute of limitations in a hybrid § 301 proceeding, applied Mississippi's statute for challenging arbitration awards to claims against the employer *and* union. *Rigby v. Roadway Exp., Inc.*, 680 F.2d 342, 343 (5th Cir. 1982). While *Rigby* assumed, without detailed analysis, that *Mitchell* extends to claims against the union, the decision undercuts the precedential value of *Edwards* and suggests that the law in the Fifth Circuit on the issue may not be altogether settled. [Continued on page 17]

II. IF MITCHELL IS NOT "EXTENDED" TO CLAIMS AGAINST THE UNION, THE COURT SHOULD BORROW THE MOST ANALOGOUS FEDERAL STATUTE OF LIMITATIONS, THE FEDERAL ARBITRATION ACT, TO PROVIDE A UNIFORM STANDARD GOVERNING THE TIMELINESS OF EMPLOYEE § 301 CLAIMS IN A HYBRID PROCEEDING

A. *Hoosier* Requires Reference To The Appropriate State Statute Of Limitations Absent A Compelling Need For Uniformity

The threshold question before the Court is the *appropriateness* of borrowing a federal, rather than a state, statute of limitations to govern hybrid § 301 claims in light of Congress' failure to establish a limitations period. In *Hoosier*, the Supreme Court, while recognizing that the timeliness of a § 301 complaint is governed by federal law and that "incompatible doctrines of local law must give way to principles of federal labor law,"[21] resisted the union's invitation to devise a uniform limitations period "to close the statutory gap left by Congress." 383 U.S. at 701. The Court acknowledged that as a consequence of its refusal to create a uniform limitations provision, the timeliness of § 301 suits would vary among the states. The

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If the Court accepts the view that an accurate characterization of the employee's claims against the employer and the union requires application of different statutes of limitations, *Mitchell* should continue to apply to employee breach of contract claims against the employer, whether or not raised in a proceeding in which the union has been joined as a party defendant. The timeliness of the claim against the union should be determined by § 10(b), rather than by tort or nonmedical malpractice statutes of limitations, which do not adequately recognize the critical importance of rapidly resolving labor disputes.

[21] *Local 174, International Brotherhood of Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962).

Court also acknowledged the desirability of a uniform standard governing § 301 suits. The Court concluded, however, that a lack of uniformity in the application of statutes of limitations would be "unlikely" to frustrate the achievement of a significant goal of federal labor policy—largely because statutes of limitations come into play only when the "consensual processes" that federal labor law seeks to promote—the negotiation of the collective agreement and the private settlement of disputes thereunder—have already broken down.

Absent a compelling need for uniformity and in view of evidence that the legislative omission of a uniform limitations provision was not inadvertent,[22] the Court adhered to a long line of consistent authority that state statutes of limitations govern the timeliness of federal claims unless Congress has expressly provided otherwise. Accordingly, *Hoosier*, which the *Mitchell* Court only recently reaffirmed, unambiguously requires reference to the appropriate state statute of limitations *unless* problems "vital to the implementation of federal labor policy" (*Hoosier*, 383 U.S. at 701) may be resolved or alleviated only by judicially creating a uniform limitations provision. *Compare Sine v. Local No. 992, International Brotherhood of Teamsters*, 644 F.2d 997 (4th Cir.) (under the Rules of Decision Act, federal courts may refer to an analogous federal statute of limitations to cure a legislative omission only if application of a state statute would frustrate federal law), *cert. denied*, 454 U.S. 965 (1981). By the same token, the Supreme Court has declined to borrow a state statute of limitations, the application of which would have frustrated the implementation of federal policy. *Occidental Life Insurance*

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[22] As the *Hoosier* Court pointed out, Congress considered the statute of limitations issue in amending the NLRA in 1947. Congress enacted § 10(b)'s six-month limitations provision after "appreciable controversy," it did not include a limitations provision in § 301. *Hoosier*, 383 U.S. at 703.

Co. v. EEOC, 432 U.S. 355, 367 (1977). Moreover, we recognize that a reasonably short limitations provision applied uniformly across state lines may eliminate the difficulties associated with different timeliness rules. *See San Diego County District Council of Carpenters v. Cory*, 685 F.2d 1137, 1140 (9th Cir. 1982). Accordingly, if the Court rejects the position that the salutary federal objectives of rapidity, uniformity and predictability are adequately served by "extending" *Mitchell* to § 301 claims against the union, and instead elects to borrow a federal statute of limitations, we urge, for reasons discussed below, selection of the FAA's three-month provision, which applies to arbitration proceedings, rather than the LMRA's six-month provision, which applies solely to unfair labor practice proceedings.

B. If The Interest In Uniformity Dictates Creation Of A Federal Statute Of Limitations For § 301, We Urge Selection Of The Three-Month Provision Of The Federal Arbitration Act

1. The FAA provides the most appropriate federal limitations period

The starting point of analysis, perhaps, is the Federal Arbitration Act itself, which generally provides for the enforcement of agreements to arbitrate. Section 12 of the FAA requires that motions to vacate or modify an arbitration award be filed within three months of its delivery. 9 U.S.C. § 12. We suggest that selection of a more analogous federal statute could scarcely be imagined in light of the very close interrelationship between § 301 and the FAA and the Supreme Court's characterization of a hybrid § 301 claim as an action to vacate an arbitration award. A significant number of courts have applied the FAA's limitations

period [23] or at least recognized its advantages.[24] Moreover, the federal limitations provision coincides with the limitations period established by the Uniform Arbitration Act, which many states have adopted.[25] In addition, the FAA's three-month provision enhances implementation of the federal goal of a rapid resolution of labor disputes. *Mitchell*, 451 U.S. at 63.

2. The ambiguous exclusionary language of section 1 of the FAA does not foreclose borrowing section 12's limitations provision

Courts rejecting the FAA rely heavily on its exclusion in section 1 of "contracts of employment" of seamen, railroad employees and workers engaged in foreign and inter-

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[23] *See San Diego County District Council of Carpenters v. Cory*, 108 LRRM 2336, 2336 (S.D. Cal. 1981); *Gas Workers Local No. 80 v. Michigan Consolidated Gas Co.*, 503 F.Supp. 155 (E.D. Mich. 1980); *Lumber, Production & Industrial Workers Local No. 3038 v. Champion International Corp.*, 486 F. Supp. 812, 813 (D. Mont. 1980); *Communications Workers of America v. Pacific Telephone & Telegraph Co.*, 462 F. Supp. 736, 739 (C.D. Cal. 1978) (FAA's statute of limitations supersedes state law in § 301 proceeding); *see also Bakery Workers, Local 434 v. Keebler Co.*, 104 LRRM 3181, 3182 (M.D. Ga. 1980); *Pizzuto v. Hall's Motor Transit Co.*, 409 F. Supp. 427, 429 (E.D. Va. 1976); *International Union, United Auto Workers v. LaCrosse Cooler Co.*, 406 F. Supp. 1213, 1215 (W.D. Wis. 1976) (compliance with 9 U.S.C. § 12 is a prerequisite of § 301 claim to vacate arbitration award); *compare Teamsters, Local 135 v. Jefferson Trucking Co.*, 473 F. Supp. 1255 (S.D. Ind. 1979) (motion to vacate arbitration award untimely under either Indiana law (90 days) or federal law (three months)), *aff'd*, 628 F.2d 1023 (7th Cir. 1980).

[24] *San Diego County District Council v. Cory, supra*, 685 F.2d at 1140-41 (recognizing the advantages of incorporating 9 U.S.C. § 12 but leaving to Congress the decision to create a uniform limitations period); *Local 1020 of the United Brotherhood of Carpenters v. FMC Corp.*, 658 F.2d 1285, 1289 (9th Cir. 1981) (applying Oregon's 20-day arbitration statute, but noting the desirability of borrowing FAA's three-month limitations provision).

[25] *See supra*, n. 4.

state commerce.[26] We contend that section 1's exclusionary language does not preclude borrowing section 12's limitations provision. "Contracts of employment" refer simply to *individual* employment contracts, rather than collective bargaining agreements. *Hoover Motor Express Co. v. Teamsters Local 327*, 217 F.2d 49, 53 (6th Cir. 1954); *Local 205, United Electrical Workers v. General Electric Co.*, 233 F.2d 85, 98 (1st Cir. 1956), *aff'd on other grounds*, 353 U.S. 547 (1957) (companion decision to *Lincoln Mills*). Indeed, the FAA was enacted in 1925, long before collectively-bargained contracts were commonplace; accordingly, Congress could not very easily have intended to include *collective* agreements within the scope of 9 U.S.C. § 1's exclusion.[27] However, if cognizance of the distinction between individual employment contracts and collective bargaining agreements may be attributed to the Congress sitting in 1925, we submit that a legislative intention to include collective agreements would have been expressed more directly. *Local 205, United Electrical Workers v. General Electric Co., supra*, 233 F.2d at 100.[28]

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[26] *Service Employees International Union, Local No. 36 v. Office Center Services, Inc., supra*, 670 F.2d at 406 n. 6 (3d Cir. 1982) (opting instead for the relevant state statute of limitations); *Sine v. Local No. 992, International Brotherhood of Teamsters, supra*, 644 F.2d at 1002; *International Union of Operating Engineers v. Kerr-McGee Refining Corp.*, 618 F.2d 657, 659 (10th Cir. 1980).

[27] The sparse legislative history of the FAA indicates that the exclusionary language was added to section 1 at the behest of the President of the Seamen's International Union. Although the legislative history does not shed light on the Seamen's motive or purpose, the context does suggest that Congress' principal focus was on the exclusion of categories of employees, rather than on the nature of their contracts. *Tenney Engineering, Inc. v. United Electrical Workers, Local 437*, 207 F.2d 450, 452 (3d Cir. 1953) (*en banc*).

[28] When Congress intended to refer to *collective* agreements or contracts, it expressed itself far more clearly. Thus, the NLRA,

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In any event, the debate which raged thirty years ago on the scope of section 1's exclusionary language was effectively stilled by the Supreme Court in *Lincoln Mills.*[29] *Lincoln Mills,* which confirmed judicial authority under § 301 to specifically enforce a promise to arbitrate contained in a collective bargaining agreement, resolved doubts in favor of coverage of labor contracts under the FAA. *See, e.g., Gas Workers Local No. 80 v. Michigan Consolidated Gas, supra,* 503 F. Supp. at 157; *Lumber, Production & Industrial Workers Local No. 3038 v. Champion International Corp., supra,* 486 F. Supp at 813. Since *Lincoln Mills,* the FAA, including its limitations provision,[30] has been applied repeatedly in § 301 proceedings. For example, federal courts routinely rely on 9 U.S.C. §§ 10 and 11, which set forth, respectively, the grounds for vacating and modifying or clarifying an arbitration award, to guide resolution of the substantive question of the award's enforceability in § 301 proceedings. If the FAA may guide federal courts "on the merits" of an employee's § 301 claim, surely the statute may similarly guide resolution of the question of the timeliness of the claim.

We submit that courts may borrow the FAA's limitations provision despite the ambiguous exclusionary language of section 1. Thus, *Mitchell* itself recognized that none of the statutes which arguably applied would "fit hand in glove." Perhaps more significant, the *Mitchell* Court

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enacted in 1935, ten years after the FAA, is replete with references to "collective" bargaining. Moreover, § 301 refers explicitly to contracts "between an employer and a labor organization"—a qualification conspicuously absent from 9 U.S.C. § 1.

[29] *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957).

[30] See cases cited *supra,* at n. 23.

applied New York's arbitration statute despite its prohibition against a discharged employee's instituting proceedings to vacate an award. 451 U.S. at 61 n. 3; *see also Stevens v. Gateway Transportation Co., supra,* 112 LRRM at 2179 ("the relevant consideration [in *Mitchell*] was not whether New York would in fact apply the statute to claims like Mitchell's but whether the kinds of claims to which it would apply its statute were 'closely analogous' to Mitchell's"). Finally, the perceived "disabilities" of the FAA notwithstanding, the incorporation of its limitations provision promotes the dual federal labor policies of uniformity and rapidity. *Mitchell,* 451 U.S. at 63 n. 5 (referring to the FAA's three-month limitations period in conjunction with its discussion of the desirability of selecting the shorter state statute for vacating arbitration awards); *see also Hoosier,* 383 U.S. a 707 (selecting generally shorter state statute of limitations governing contracts not exclusively in writing comports with federal goal of "relatively rapid disposition of labor disputes").[31]

3. The selection of § 10(b) of the LMRA, although not entirely without support, neither conforms to legislative intent nor adequately recognizes the essential character of the employee's hybrid § 301 claim

The selection of § 10(b), in contrast to 9 U.S.C. § 12, neither conforms to clearly expressed legislative intent nor recognizes the essential character of the employee's hybrid § 301 claim. The legislative history of the 1947 amend-

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[31] An employee who fails to challenge an award within the 90 days contemplated by the FAA may not be altogether without recourse since under § 10(b) of the LMRA, he would have an additional 90 days within which to file an unfair labor practice charge against the union on the representation portion of his claim. Assuming, of course, that the union's conduct amounted to an unfair labor practice, the Board could fashion an appropriate remedy.

ments establishes that Congress left to arbitrators and the courts the principal responsibility for adjudicating disputes arising under a collective bargaining agreement, while reserving to the Board the responsibility for adjudicating unfair labor practices. Thus, under a proposed amendment, violation by employers or unions of "the terms of a collective bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration" would have constituted an unfair labor practice. S. 1126, 80th Cong., 1st Sess. 13 (1947), *reprinted in* I. Leg. Hist. LMRA, 99, 111. Nonetheless, the Senate Committee reporting out the bill emphasized that the Board should entertain claims of contract violation only "on a highly selective basis," when "alternative methods of settling the dispute have been exhausted or not available." S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947), *reprinted in* I. Leg. Hist. LMRA, 407, 429.

Significantly, the proposed amendment was deleted from the final version of the bill altogether, with the explanation that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual process of law and not to the NLRB." H.R. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947), *reprinted in* I Leg. Hist. of the LMRA, 505, 546. Instead, Congress enacted § 301 which, of course, provides the parties to a collective bargaining agreement a mechanism for judicial enforcement of contractual obligations.[32]

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[32] *See NLRB v. Strong*, 393 U.S. 357, 360-361 (1969) (Congress not only has denied the Board "plenary authority to administer and enforce collective bargaining agreements" but also established arbitrators and the courts as "the principal sources of contract interpretation"); *Charles Dowd Box Co. v. Courtney* 368 U.S. 502, 511 (1962) (in enacting § 301, Congress "decided to make collective bargaining agreements enforceable *only* in the courts") (emphasis added). The Board itself has long recognized that it is "not the proper forum for parties seeking to remedy an alleged breach of con-

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The dichotomy between the Board and arbitral processes which the legislative history reflects underscores the inappropriateness of borrowing a limitations provision which so plainly applies solely to the NLRB's unfair labor practice proceedings.[33] We have previously demonstrated that the essential character of an employee's § 301 claim is the underlying breach of contract, which only rarely may even be accurately *characterized* as an unfair labor practice. Since the employee is seeking judicial enforcement of *contractual*, rather than *statutory*, obligations, incorporation of a statute of limitations from the LMRA, in preference to the more closely related FAA, would be rather anomalous.

Proponents of § 10(b) maintain that the policy behind § 10(b)—"to protect continuing collective bargaining systems from delayed attack"—applies with equal force in the context of hybrid § 301 proceedings. 451 U.S. at 68 (Stewart, J., concurring in the judgment). As Justice Stewart acknowledged, however, the underlying question whether a union which breaches its duty of fair representation thereby commits an unfair labor practice has not yet

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tract or to obtain specific enforcement of its terms." *United Tel. Co. of the West*, 112 NLRB 779, 782 (1955); *see also Hyde's Super Market*, 145 NLRB 1252, 1253 (1964), *enforced sub nom. NLRB v. Hyde*, 339 F.2d 568 (9th Cir. 1964); *cf. Consolidated Aircraft Corporation*, 47 NLRB 694, 706 (1943), *enforced*, 141 F.2d 785 (9th Cir. 1944). Of course, if the claim states *either* an alleged contract or statutory violation, the Board has concurrent jurisdiction. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967).

[33] The plain language of § 10(b) confirms the Congressional purpose to restrict § 10(b)'s statute of limitations to the NLRB's unfair labor practice proceedings. *Edwards v. Sea-Land Service, Inc.*, *supra*, 678 F.2d at 1291 (declining to adopt the limitations period contained in § 10(b), which applies only to unfair labor practices); *Flowers*, *supra*, 671 F.2d at 90-91 (rejecting application of § 10(b) which "relates only to administrative procedures established by Congress to resolve unfair labor practices").

been resolved. While the Board, and perhaps a majority of the Courts of Appeals, have concluded that a breach of the duty of fair representation constitutes an unfair labor practice, the contrary view is persuasively supported [34] and the Supreme Court has not addressed the issue. *Vaca v. Sipes*, 386 U.S. at 186 (assuming, without deciding, that the breach of duty is an unfair labor practice). In addition, the considerations cited by Justice Stewart in support of adopting § 10(b)—including the need for speedy and final resolution of labor disputes, the need for uniformity of procedures for similar claims, and the "clear Congres-

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[34] *Miranda Fuel Co.*, 140 NLRB 181, 199-202 (1962) (Members McCulloch and Fanning, dissenting), *enforcement denied, NLRB v. Miranda Fuel Co.*, 326 F.2d 172, 175-178 (2d Cir. 1963). While acknowledging that breaches of the representation duty may not be unfair labor practices, Justice Stewart maintains that § 10(b) nonetheless appropriately governs the timeliness of breach of duty claims since Congress clearly indicated in § 10(b) "when claims of a very similar or identical character must be brought." 451 U.S. at 67-68. Justice Stewart's position is significantly undercut by the legislative history of § 10(b). Thus, the limitations provision was added to § 10(b) when the NLRA was amended in 1947. The debate accompanying the adoption of the six-month period confirms that Congress intended its application only to administrative unfair labor practice proceedings. The only controversial issue before Congress on the statute of limitations was whether the six-month period was unreasonably short. In addition, Justice Stewart's position is difficult to reconcile with the fact that the duty of fair representation under the NLRA was first judicially recognized *six* years after § 10(b) was amended in 1947 to include a six-month limitations provision. *Ford Motor Co. v. Huffmann*, 345 U.S. 330 (1953).

Recently, the Seventh Circuit, undisturbed by the foregoing chronology, blithely concluded that the 1947 Congress may well have extended § 10(b)'s limitations rule to § 301 claims against the union *if* it had been cognizant of the issue. *Hall v. Printing Union Local 3, supra*, 112 LRRM at 2155. We underscore that § 10(b)'s statute of limitations and § 301 were enacted *concurrently;* accordingly, the Seventh Circuit notwithstanding, Congress' failure to incorporate § 10(b)'s six-month provision into § 301 is most consistent with the intent that federal courts refer to state statutes to supply the limitations period.

sional indication of the proper balance between the interests at stake" (451 U.S. at 70)—apply with at least equal force to the FAA.[35]

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[35] The FAA, of course, provides a significantly shorter limitations period which "only enhance[s] the implementation of federal labor policy." *Fedor v. Hygrade Food Products Corp., supra,* 533 F. Supp at 271-272. Insulation of the collective bargaining system from § 301 challenges 90 days after the rendering of an award preserves the stability of the system while affording aggrieved employees adequate opportunity to vindicate their rights if the system malfunctions. Indeed, statutes with even shorter periods have been applied consistent with federal labor policy. *Local 1020 of the United Brotherhood of Carpenters v. FMC Corp., supra.,* 658 F.2d at 1289-1292 (applying Oregon's 20-day arbitration statute); *Del Costello v. International Brotherhood of Teamsters,* 524 F. Supp. 721, 725 (D.Md. 1981) (30 days), *aff'd without opinion,* 679 F.2d 879 (4th Cir. 1982); *McNutt v. Airco Indus. Gases Div., supra,* 687 F.2d at 543 (30-day limitations period is not unreasonably short); *Fedor v. Hygrade Food Products Corp., supra* (applying 30-day period under the Pennsylvania statute which had been recently amended to reduce the limitations period from 90 to 30 days).

CONCLUSION

For the above stated reasons, this Court should reverse *Flowers* and extend *Mitchell* by applying state arbitration statutes to breach of duty claims against the union. Alternatively, the Court should apply the three-month limitations provision of the FAA, or, if not, the six-month period of the LMRA, to claims against the employer and union.

Respectfully submitted,

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